DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services
Office of Hearings
7500 Security Boulevard
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Baltimore, MD 21244

July 5, 2023

Via Electronic Delivery

Janet Eisenberg
Chinese Hospital Association
445 Grant Avenue, Suite 700
San Francisco, CA 94108

Amber Casserly
MAPD Appeals Team
7500 Security Blvd
Woodlawn, MD 21244

RE: Hearing Officer Decision
Hearing Officer Docket Number: H-23-00004
Medicare Advantage/Prescription Drug Plan Contract Denial
Chinese Community Health Plan, Contract Number: H0571

Dear Ms. Eisenberg and Ms. Casserly:

A copy of the Hearing Officer's decision for the above-referenced appeal is attached.

The Hearing Officer's decision may be appealed to the Administrator of the Centers for Medicare & Medicaid Services. The parties may request review by the Administrator within 15 calendar days of receiving this decision. *See* 42 C.F.R. § 422.692; 42 C.F.R. § 423.666. Requests for review should be sent via email to Jacqueline R. Vaughn, Director, Office of the Attorney Advisor, at Jacqueline.Vaughn@cms.hhs.gov, with a copy to Arlene O. Gassmann, Paralegal Specialist, at Arlene.Gassmann@cms.hhs.gov.

Sincerely,

Office of Hearings

DEPARTMENT OF HEALTH AND HUMAN SERVICES
CENTERS FOR MEDICARE & MEDICAID SERVICES

Chinese Community Health Plan **Contract No. H0571,** **Appellant** **v.** **Centers for Medicare & Medicaid Services,** **Respondent**	* * * * * * * * * * *	**Denial of Initial Application to Offer Medicare Advantage/ Medicare Advantage-Prescription Drug Plan** **Contract Year 2024** **Hearing Officer Docket No. H-23-00004**

ORDER GRANTING CMS' MOTION FOR SUMMARY JUDGMENT

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I. FILINGS

This Order is being issued in response to the following:

(a) Chinese Community Health Plan's ("CCHP") Hearing Request filed on May 23, 2023;
(b) CCHP's Opening Brief ("CCHP Opening Brief")[1] and exhibits filed on May 31, 2023;
(c) Centers for Medicare & Medicaid Services' ("CMS'") Memorandum and Motion for Summary Judgment Supporting CMS' Denial of CCHP's Initial Application for a Medicare Advantage ("MA")/MA-Prescription Drug ("MA-PD") Contract, Contract Number H0571 ("CMS Memorandum and MSJ") and exhibits filed on June 6, 2023; and
(d) CCHP's Additional Exhibits filed on June 12, 2023.

II. JURISDICTION

This appeal is provided pursuant to 42 C.F.R. § 422.660. The CMS Hearing Officer designated to hear this case is the undersigned, Amanda S. Costabile.

III. ISSUE

Whether CMS' denial of CCHP's application to expand the service area of its MA Contract Number H0571 to include Alameda County and Contra Costa County was inconsistent with regulatory requirements.

IV. DECISION SUMMARY

The Hearing Officer grants CMS' Motion for Summary Judgment. The Hearing Officer's authority is limited to deciding if CMS' determination was consistent with regulatory requirements. *See* 42 C.F.R. §§ 422.660 and 423.650. Within its application, CCHP was required to fully complete all parts of the application in the form and manner required by CMS, including demonstrating compliance with network adequacy standards outlined in 42 C.F.R. § 422.116(a)(1)(ii). CCHP concedes that its April 27, 2023, Health Service Delivery ("HSD") Provider Table for Contra Costa County showed network deficiencies that resulted in CMS denying its application. CCHP Opening Brief at 1-2. The Hearing Officer finds that CMS applied and followed the controlling regulations. Accordingly, the Hearing Officer upholds CMS' denial of CCHP's application.

V. BACKGROUND, AUTHORITY, AND CMS APPLICATION REQUIREMENTS AND REVIEW

Under Title XVIII of the Social Security Act (codified at 42 U.S.C. §§ 1395-1395lll) CMS is authorized to enter into contracts with entities seeking to offer Medicare Part C and Part D benefits

[1] Although CCHP filed a Reply Brief, the Hearing Officer notes that the Reply Brief was identical to its Opening Brief.

to beneficiaries. 42 U.S.C. § 1395w-27, 112. Any entity seeking such a contract must fully complete all parts of a certified application in the form and manner required by CMS. 42 C.F.R. § 422.501(c)(1). CMS requires an entity seeking to contract as an MA organization[2] to submit an application through the Health Plan Management System ("HPMS"). *See* "Part C-Medicare Advantage and 1876 Cost Plan Expansion Application" at https://www.cms.gov/files/document/cy-2024-medicare-advantage-part-c-application.pdf-1 at 6-7 (last visited June 27, 2023). The "Part C-Medicare Advantage and 1876 Cost Plan Expansion Application" is specifically "[f]or all new applicants and existing Medicare Advantage organizations seeking to expand a service area[.]" *Id*. at 1.

Beginning with contract year 2024, an MA organization's application for an expanding service area must demonstrate compliance with the network adequacy requirements set forth under 42 C.F.R. § 422.116 as part of its application. 42 C.F.R. § 422.116(a)(1)(ii) (2023). Within an application seeking a service area expansion, an MA organization must demonstrate that the number and type of providers available to plan enrollees are sufficient to meet projected needs of the population to be served. 42 C.F.R. § 422.112(a)(4). As such, the MA organization must meet maximum time and distance standards and contract with a specified minimum number of each provider and facility-specialty type. 42 C.F.R. § 422.116(a)(2). To demonstrate compliance with these network adequacy standards, applicants must upload, as part of the application, Provider and Facility HSD Tables into HPMS. *See* "Part C-Medicare Advantage and 1876 Cost Plan Expansion Application" at https://www.cms.gov/files/document/cy-2024-medicare-advantage-part-c-application.pdf-1 at 27; *see also* December 2022 Instructions, CMS Exhibit C-3 at 2. Furthermore, under 42 C.F.R. § 422.116(a)(1)(ii), CMS may deny an application on the basis of an evaluation of the applicant's network for the expanding service area.

The regulatory subsections 42 C.F.R. § 422.116(b)(1)-(2) list the provider-specialty types and facility-specialty types to which the network adequacy evaluation applies. CMS explains that its "network review is performed through an automated tool within HPMS that compares the network data submitted by each applicant against standardized CMS network adequacy criteria published in the annual reference file[.]" CMS Memorandum and MSJ at 3. CMS states that the automated tool "generates two reports," called the Automated Criteria Check ("ACC"), for "Provider" and "Facility," "that show whether a provider in a given county is passing the network adequacy requirements." *Id*. Lastly, CMS asserts that "[t]he ACC reports are accessible within the system to reflect where the applicant stands with respect to meeting the standardized criteria." *Id*; *see also* December 2022 Instructions, CMS Exhibit C-3 at 2.

Under specific circumstances and rules, CMS permits applicants that are unable to satisfy network adequacy criteria to submit exception requests. 42 C.F.R. § 422.116(f); *see* Medicare Advantage and Section 1876 Cost Plan Network Adequacy Guidelines, located at www.cms.gov/files/document/medicare-advantage-and-section-1876-cost-plan-network-adequacy-guidance08302022.pdf at 5 (last updated Aug. 30, 2022) (hereinafter "Network

[2] The term "MA organization" means a public or private entity organized and licensed by a state as a risk-bearing entity (with the exception of provider-sponsored organizations receiving waivers) that is certified by CMS as meeting the MA contract requirements. 42 C.F.R. § 422.2.

Adequacy Guidelines"). CMS requires each applicant to use the Exception Request Template via HPMS. Network Adequacy Guidelines at 8. In order to be eligible for an exception request, there must be an insufficient number of available providers that meet network adequacy standards. 42 C.F.R. § 422.116(f)(1)(i).

CMS evaluates an application solely based on information contained in the application itself and any relevant past performance history associated with the applicant. 42 C.F.R. § 422.502(a)(1) and (b)(1). After evaluating all relevant information, CMS determines whether the applicant meets all requirements. 42 C.F.R. § 422.502(a)(2). If applicable, CMS issues an applicant a Deficiency Notice that provides notice of any application deficiencies. CMS Memorandum and MSJ at 3.

If an applicant fails to cure its deficiencies listed within the Deficiency Notice, CMS will issue a Notice of Intent to Deny ("NOID"). 42 C.F.R. § 422.502(c)(2)(i). The NOID affords an applicant a second opportunity to cure its application. *See* 42 C.F.R. § 422.502(c)(2)(ii). After a NOID is issued, an applicant has a final ten-day period to cure any deficiencies in order to meet CMS' requirements; otherwise, CMS will deny the application. 42 C.F.R. § 422.502(c)(2)(ii)–(iii).

The formal NOID process is outlined at 42 C.F.R. § 422.502(c)(2)(i)–(iii), which states:

> (i) If CMS finds that the applicant does not appear to be able to meet the requirements for an MA organization or Specialized MA Plan for Special Needs Individuals, CMS gives the applicant notice of intent to deny the application for an MA contract or for a Specialized MA Plan for Special Needs Individuals a summary of the basis for this preliminary finding.
>
> (ii) Within 10 days from the intent to deny, the applicant must respond in writing to the issues or other matters that were the basis for CMS' preliminary finding and must revise its application to remedy any defects CMS identified.
>
> (iii) If CMS does not receive a revised application within 10 days from the date of the notice, or if after timely submission of a revised application, CMS still finds that the applicant does not appear qualified or has not provided CMS enough information to allow CMS to evaluate the application, CMS will deny the application.

If, after review, CMS denies the application, written notice of the determination and the basis for the determination is given to the applicant. 42 C.F.R. § 422.502(c)(3).

If CMS denies an MA application, the applicant is entitled to a hearing before a CMS Hearing Officer. 42 C.F.R. § 422.502(c)(3)(iii). The applicant has the burden of proving by a preponderance of the evidence that CMS' determination was inconsistent with the requirements of 42 C.F.R. §§ 422.501 (application requirements) and 422.502 (evaluation and determination procedures). 42 C.F.R. § 422.660(a)(1). In addition, either party may ask the Hearing Officer to

rule on a Motion for Summary Judgment. 42 C.F.R. § 422.684(b). The authority of the Hearing Officer is found at 42 C.F.R. § 422.688, which specifies that "[i]n exercising his or her authority, the hearing officer must comply with the provisions of title XVIII [of the Social Security Act ("Act")] and related provisions of the Act, the regulations issued by the Secretary, and general instructions issued by CMS in implementing the Act."[3]

VI. PROCEDURAL HISTORY AND STATEMENT OF FACTS

CCHP is a "community[-]based organization [that has been] serv[icing] the [San Francisco] bay area" since 1986, and servicing Medicare beneficiaries since 1994. CCHP Opening Brief at 1. By the February 15, 2023, deadline, CCHP submitted a service area expansion application for its existing contract number H0571. CMS Memorandum and MSJ at 4-5; *see also* CMS' May 17, 2023 Denial of Service Area Expansion Application, CMS Exhibit C-1 at 1. Within its service area expansion application, CCHP sought to expand its service area beyond San Francisco County to "neighboring Alameda and Contra Costa Counties." CCHP Opening Brief at 1.

On March 20, 2023, CMS issued a Deficiency Notice to CCHP. CMS Exhibit C-8. Specifically, the Deficiency Notice stated that CCHP "failed to submit a fully and appropriately completed CMS State Certification Form[,]" and "failed to upload [both] provider and facility HSD tables in the Network Management Module [("NMM")]." *Id* at 1. The Deficiency Notice informed CCHP that it had the "opportunity to correct the deficiencies identified in this notice[,]" and that CCHP had until March 28, 2023, to submit all changes in HPMS. *Id*. at 2. The Deficiency Notice also stated that CCHP had "the option to withdraw or reduce the service area of [its] pending application." *Id*.

Subsequently, CMS issued an April 17, 2023, NOID to CCHP in which CMS stated that, based on "the automated review of" CCHP's MA Provider Table and MA Facility Table, neither CCHP's "contracted network of providers" nor its "contracted network of facilities" met "CMS network standards."[4] CMS Exhibit C-10 at 1. The NOID instructed CCHP that it had until April 27, 2023, to cure the deficiencies listed "in order to receive approval" on its application. *Id.* at 2. The NOID also advised that CCHP had "the option to withdraw or reduce the service area of [its] pending application." *Id*.

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[3] Within the preamble to the 2010 Final Rule, the Secretary provided additional clarification regarding the hearing process:

> [T]he applicant would not be permitted to submit additional revised application material to the Hearing Officer for review should the applicant elect to appeal the denial of its application. Allowing for such a submission and review of such information would, in effect, extend the deadline for submitting an approvable application.

Policy and Technical Changes to the Medicare Advantage and Medicare Prescription Drug Benefit Programs, 75 Fed. Reg. 19678, 19683 (April 15, 2010).

[4] Although not mentioned in either party's brief, the NOID no longer cited the lack of a CMS State Certification Form as being a deficiency.

On May 17, 2023, CMS issued CCHP a "Denial of MA, MA-PD Service Area Expansion Application," stating that, with respect to CCHP's "MA Provider Table," CMS found that CCHP's "contracted network of providers [did] not meet CMS network standards." CMS Exhibit C-1 at 1. Within its Opening Brief, CCHP clarifies that CMS' deficiency findings pertain to three "specialties in the Contra Costa County" network. CCHP Opening Brief at 1. Specifically, CCHP's Opening Brief highlighted the "Distance Actual (%)" column pertaining to the Contra Costa County provider specialties of Neurosurgery, Plastic Surgery, and Urology, for which the "ACC Status" denotes "Fail." *Id*.; *see also* CCHP Exhibit B; CMS Exhibit C-6.

CCHP filed its Request for a Hearing on May 23, 2023. On May 24, 2023, the Office of Hearings acknowledged the appeal request and provided the parties with a hearing date and briefing schedule. *See* CMS Exhibit C-2. The parties submitted their respective briefs pursuant to the briefing schedule.

Within its Opening Brief, CCHP requests that (1) "CMS approves the Alameda County service area expansion[] separately" from Contra Costa County, as its Alameda County HSD Tables "did not show any deficiencies"; and (2) for Contra Costa County, it be "given the opportunity to correct the network deficiencies as its "submission on April 27 did not include the most updated provider listing[.]" CCHP Opening Brief at 1-2 (emphasis omitted). CCHP further asserts that "CMS' denial was based solely on network specialists' gaps identified . . . at an earlier point in time[,] [and that] CCHP has corrected the HSD Provider Table using the most updated . . . Provider Listing by generating its own internal Plan-Report[,]" included as CCHP's Exhibit C. *Id*. at 3.

In its responsive brief, CMS moved for summary judgment in its favor. *See* CMS Memorandum and MSJ at 1.

VII. DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Hearing Officer hereby grants CMS' Motion for Summary Judgment. The parties do not dispute the material facts pertinent to the instant appeal. *See* CMS Memorandum and MSJ at 1; CCHP Opening Brief at 1. CCHP failed to demonstrate compliance with the network adequacy requirements within 42 C.F.R. § 422.116 for Contra Costa County, CA.[5]

The Hearing Officer hereby denies CCHP's request to approve its Alameda County service area expansion request separately from its Contra Costa County service area expansion request, and its request to overturn CMS' denial based on CCHP's purported correction of its HSD Provider Table for Contra Costa County that CCHP concedes was completed after the application deadline.

[5] On page 5 of its Memorandum and MSJ, without citing to the record, CMS alleges that "CCHP failed to provide documentation of an adequate provider network in Alameda and Contra Costa counties in California[,]" but CCHP argues, within its Opening Brief, that the provider table at issue concerns only Contra Costa County. The Hearing Officer did not identify any materials in the record that relate to CMS' allegation that the network in Alameda was inadequate.

As noted above, the authority of the Hearing Officer is limited under 42 C.F.R. § 422.688, which mandates that "the hearing officer must comply with the provisions of title XVIII [of the Social Security Act ("Act")] and related provisions of the Act, the regulations issued by the Secretary, and general instructions issued by CMS in implementing the Act."

Under the applicable regulations, CMS evaluates an MA organization's service area expansion application solely based on the information contained in the application itself (and any relevant past performance history). *See* 42 C.F.R. § 422.502(a)(1) and (b)(1). As such, prior to CMS' final application decision, CMS provides applicants opportunities to correct deficiencies identified within an application or, alternatively, applicants "have the option to withdraw or reduce the service area" of an application. *See* CMS Exhibit C-8 (March 20, 2023 Deficiency Notice); CMS Exhibit C-10 (April 17, 2023 NOID); CMS Memorandum and MSJ at 4-5. Additionally, CMS also informs, within the Deficiency Notices and NOIDs, that for "provider(s) that fail the network criteria[,]" applicants "may submit Exception Requests[.]"[6] *Id.*; *see also* 42 C.F.R. § 422.116(f).

In addition, CMS requires applicants to fully complete an application in the form and manner required by CMS, including providing, as part of its application, Provider and Facility HSD Tables uploaded into HPMS. *See* 42 C.F.R. § 422.501(c)(1); *see also* "Part C-Medicare Advantage and 1876 Cost Plan Expansion Application" at https://www.cms.gov/files/document/cy-2024-medicare-advantage-part-c-application.pdf-1 at 27.

Although CCHP claims that its network is now in compliance with CMS' requirements as shown in its internally generated provider network report, CMS has not reviewed this report, and, regardless, as stated, CMS requires applicants to timely submit HSD Tables within HPMS as part of the application. CCHP admits that the Contra Costa County Provider Table that it submitted with its application and uploaded into HPMS documented network deficiencies in certain provider specialties. *See* CCHP Opening Brief at 1-2. CCHP has not shown that CMS' denial of its service area expansion application, based on the deficiencies cited within the Contra Costa County Provider Table submitted as part of its application within HPMS, was inconsistent with regulatory requirements. *See* 42 C.F.R. §§ 422.660 and 422.688. Additionally, the Hearing Officer finds no support for CCHP's request that CMS, at this stage, consider or accept CCHP's purported corrections from its final application submission upon which CMS issued its May 17, 2023 denial determination.

[6] On April 17, 2023, CMS emailed CCHP a message regarding the "Network Exception Window Open for H0571." CMS Exhibit C-9.

VIII. DECISION AND ORDER

The Hearing Officer does not possess the authority to provide the relief that CCHP seeks, namely, its request to separately approve the portion of its service area expansion request that pertains to Alameda County and/or its request to consider its internally generated provider network for Contra Costa County. *See* 42 C.F.R. § 422.688. The Hearing Officer finds that CCHP has not proven, by a preponderance of evidence, that CMS' denial of CCHP's service area expansion application was inconsistent with regulatory requirements. *See* 42 C.F.R. §§ 422.660 and 422.688. The Hearing Officer finds that CMS applied and followed the controlling regulations. Accordingly, the Hearing Officer grants CMS' MSJ and upholds CMS' denial of CCHP's service area expansion application for contract number H0571.

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Amanda S. Costabile, Esq.
CMS Hearing Officer

Date: July 5, 2023

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop C3-01-20
Baltimore, Maryland 21244-1850
Phone 410-786-3176

Re: Chinese Community Health Plan, Contract Number: H0571

The Administrator, Centers for Medicare & Medicaid Services, hereby declines to review the CMS Hearing Officer decision entered in the above-referenced case.

Recommended:

Jacqueline Vaughn
Jacqueline R. Vaughn
Attorney Advisor

APPROVED:

Date: July 18, 2023

Jonathan Blum
Principal Deputy Administrator
Centers for Medicare & Medicaid Services